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No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

GARNETT WILLIAM CAPE

Petitioner,

-against-

WALTER D. ZANT,
Superintendent
Georgia Diagnostic
Classification
Center

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

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QUESTIONS PRESENTED

1. What minimum standard of competence of defense counsel is required in capital cases in order to satisfy the Sixth, Eighth and Fourteenth Amendments to the Constitution?

2. Whether petitioner's rights under the Sixth, Eighth and Fourteenth Amendments were violated by counsel's lack of competence, including his failure to present available evidence in mitigation at the sentencing phase of petitioner's trial?

3. Whether instruction of the jury in the bare words of the statute authoritizing the death penalty for any murder found to be "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim" provided sufficient guidance for the consideration of the death penalty as required by the Eighth and Fourteenth Amendments?

4. Whether the Georgia courts have adopted such a broad and vague construction of the word "torture" in upholding petitioner's sentence of death as to violate the Eighth and Fourteenth Amendments to the Constitution?

TABLE OF CONTENTS

Table of Authorities iii

Opinion Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

How the Federal Question Was Presented and Decided Below 6

Reasons for Granting the Writ 8

I. This Court should review the decision below to decide what standard of competence of counsel is constitutionally required in death penalty cases 8

II. The decision of the court below is in conflict with decisions of this Court requiring that consideration of the death penalty be guided by clear and objective standards 15

III. The Georgia courts continue to construe its death penalty statute in a vague and overbroad manner in conflict with applicable decisions of this court 18

Conclusion 21

Appendix

Opinion of the Superior Court of Butts County 1a

Order of Georgia Supreme Court denying application for probable cause to appeal 20a

Order of Georgia Supreme Court denying motion to reconsider denial of application for probable cause to appeal 21a

TABLE OF AUTHORITIES

Cases

Baker v. State, ___ Ga. ___, 272 S.E.2d 61 (1980), cert. denied, ___ U.S. ___, 67 L.Ed.2d 312 (1981) 20

Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980); cert. denied, ___ U.S. ___, 68 L.Ed.2d 312 (1981) 20

Bruce v. United States, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967) 10

Cape v. State, 246 Ga. 520, 272 S.E.2d 487 (1980) cert. denied, ___ U.S. ___, 67 L.Ed.2d 121 (1981) 5, 19

Commonwealth v. Seferian, 366 Mass. 89, 315 N.E. 2d 878 (1974) 9

Cooper v. Fitzharris, 551 F.2d 1162, vacated, 586 F.2d 1325 (9th Cir. 1978)(en banc) 9, 10

Diggs v. Welch, 80 U.S. App. D.C. 5, 148 F.2d 667 (1945) 10

Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980) . . . 9

Eddings v. Oklahoma, ___ U.S. ___, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982) 10, 15

Furman v. Georgia, 408 U.S. 238 (1972). 16, 18

Gardner v. Florida, 430 U.S. 349 (1977) 14

Godfrey v. Georgia, 446 U.S. 420 (1980) 16, 17, 18, 19, 20

Gregg v. Georgia, 428 U.S. 153 (1976) 16, 18

House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974) 20

Johnson v. United States, 413 A.2d 499 (D.C. App. (1980) 9

Lang v. Murch, 438 A.2d 194 (Me. 1981) 9

Lockett v. Ohio, 438 U.S. 586 (1978) 10, 11, 14, 15

MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961) . . . 7, 8

Maryland v. Marzullo, 435 U.S. 1011 (1978) 10

McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 277 (1974) 20

McMann v. Richardson, 397 U.S. 759 (1970) 8

Mulligan v. State, 245 Ga. 881, 268 S.E.2d 351 (1980) cert. denied, 449 U.S. 986 (1980) . . . 19

People v. Pope, 23 Cal.3d 412, 590 P.2d 859 152 Cal. Rptr. 732 (1979) 9

Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974) 7, 8

Presnell v. Georgia, 439 U.S. 14 (1979) 18

Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) 18

State v. Myles, 389 So.2d 12 (La. 1980) 14

State v. Orona, 638 P.2d 1077 (N.M. 1982) 9

United States v. DeCoster, 159 U.S. App. D.C. 326, 487 F.2d 1197 (1973) (DeCoster I) 10

United States v. Decoster, 199 U.S. App. D.C. 359, 624 F.2d 196 (1979), cert. denied, 444 U.S. 944 (1979) (DeCoster III) 9, 10

United States v. Easter, 539 F.2d 633 (8th Cir. 1976) 9

Woodson v. North Carolina, 428 U.S 280 (1976) . . . 14

Constitutional Provisions and Statutes

United States Constitution
Sixth Amendment 2, 6, 7 8, 9, 10

United States Constitution
Eighth Amendment 2, 6, 7, 8, 10, 11, 15, 18

United States Constitution
Fourteenth Amendment 2, 6, 7, 11, 18

28 U.S.C. § 1257 (3) (1976) 2

Ga. Code Ann. § 26-3102 17

Ga. Code Ann. § 27-2534.1(b)(7) . . . . . passim

Ga. Code Ann. § 27-2534.1(c) 17

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American Bar Association Standards Relating to the Administration of Criminal Justice, The Defense Function 14

Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am. Cr. L. Rev. 233 (1979) 9

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

OPINION BELOW

The decision of the Superior Court of Butts County is appended to this petition at 1a. It was not reported. The Supreme Court of Georgia denied an application for a certificate of probable cause to appeal, thereby declining to review the decision of the Superior Court of Butts County. The orders of the Georgia Supreme Court denying the application and a motion to reconsider the denial are appended at 20a and 21a.

JURISDICTION

The decision of the Superior Court of Butts County was entered October 28, 1981. Petitioner sought review of the decision by the Supreme Court of Georgia. That court denied an application for probable cause to appeal on February 24, 1982. Appendix at 20a. The Supreme Court of Georgia also denied an application for reconsideration of its denial on March 24, 1981. Appendix at 21a. Said denial of an applica-

tion for probable cause to appeal operates to deny petitioner any review of the decision of the Superior Court of Butts County by a state court in Georgia. Jursidiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

This case involves the seventh aggravating circumstance of Georgia's death penalty statute, Ga. Code Ann. § 27-2534.1 (b)(7), which provides for the death penalty where:

> The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

STATEMENT OF THE CASE

Garnett William Cape seeks a writ of certiorari from this Court to the Superior Court of Butts County, Georgia, to review a decision of that court denying his application for a writ of habeas corpus.

Mr. Cape asserted in the court below that he was being wrongfully detained by the respondent pursuant to a conviction

of murder and sentence of death which were imposed upon him by the state of Georgia in violation of rights guaranteed by the Constitution of the United States, and asked that court to vacate his conviction and sentence. He alleged, inter alia, that he was denied effective assistance of counsel at his trial because of the inadequacy of his court-appointed attorney, that the discretion of the jury that sentenced him to death was not properly guided by the trial court, and that he was sentenced to death under a vague and overbroad construction of the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1 (b)(7), which provides for the death penalty where the offense of murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

The Superior Court of Butts County denied the application for a writ of habeas corpus, and the Supreme Court of Georgia declined to review the decision.

Mr. Cape was fifty-six years of age at the time of his trial on the charge of murder. He lived most of his life in Franklin County or the neighboring Hart County in northeast Georgia, had one son, and supported his family by working in the plumbing and electrical business. His arrest on the evening of May 17, 1979, in connection with the murder of Karen Dove was his first arrest.

Mr. Cape was tried by a jury in the Superior Court of Franklin County, November 5-8, 1979. P's pretrial motion for a change of venue was denied, Tr. 19A, 22A. 1/ The State

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1/ "Tr." refers to the transcript of petitioner's trial in the Franklin Superior Court. "R." refers to the record on appeal in the direct appeal of his conviction to the Georgia Supreme Court, both of which were made a part of the record in the court below. "HC" refers to the transcript of the hearing on the petition for a writ of habeas corpus before the Butts County Superior Court on May 19, 1981.

presented evidence that the body of Karen Dove, age fifteen, was discovered at Mr. Cape's home on the evening of May 17. Tr. 266. She had suffered extensive injuries, including seven stab wounds. Tr. 389-301. The State introduced evidence that petitioner had been with the decedent earlier on the afternoon on which her body was found. Tr. 572. It also introduced inculpatory statements by petitioner. Tr. 454-55, 466-67, 470-71.

In his defense, Mr. Cape called nine witnesses who testified to his good character and reputation for nonviolence in the community. Tr. 586-603. Mr. Cape also testified and denied killing the decedent. Tr. 604-92.

At a brief sentencing hearing, Mr. Cape's son, two sisters and a brother were called and asked a few questions about Mr. Cape. Tr. 782-786.[2/] Mr. Cape also took the witness stand and asked the jury not to send him to the electric chair. Tr. 787. The State presented Agent R.C. Patterson of the Georgia Bureau of Investigation. Agent Patterson testified that in his opinion he had never seen a death more brutal than this one. Tr. 780.

The State had alleged that the murder was aggravated by the conditions set forth in Georgia Code Ann. Sec. 27-2534.1(b)(7). The trial court instructed the jury as follows regarding that aggravating circumstance:

> Now, in this case, ladies and gentlemen, the one we are trying, the State contends that the offense of murder for which the accused, Garnett William Cape, has been convicted was outrageously or wantonly vile, horrible, or inhuman, in that

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2/ The Superior Court of Butts County incorrectly stated in its findings of fact that six witnesses were called on behalf of petitioner. Op. at 5, App. at 5a. Although six witnesses were called at the hearing, two were called by the State. Tr. 777, 781.

> it involved torture, depravity of mind, or an aggravated battery to the victim, Karen Dove.

Tr. 812. The jury was given no definition of any of the terms of section (b)(7) or any other guidance in the application of the statute to the facts of the case. With regard to mitigating circumstances, the jury was told that it could consider "those circumstances which in fairness and mercy shall be considered by you in fixing the punishment[]" without further elaboration. Tr. 813.

The jury recommended that Mr. Cape be sentenced to death and the court accordingly sentenced him to death in the electric chair. Tr. 816-17. The conviction and sentence were upheld on direct appeal by the Supreme Court of Georgia, Cape v. State, 246 Ga. 520, 272 S.E.2d 487 (1980), cert. denied, ___ U.S. ___, 67 L.Ed.2d 121 (1981).

Thereafter, Mr. Cape filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, where he is confined on death row awaiting execution. The Superior Court issued a stay of execution and conducted a hearing on May 19, 1981. However, the court denied petitioner's motion for funds to retain counsel, investigators, experts and law clerks to aid him in the presentation of evidence in support of his contentions. Even petitioner's request for authorization to subpoena witnesses and for witness fees and mileage expenses was denied. As a result, petitioner was represented by volunteer counsel at his hearing.

Nevertheless, petitioner presented the testimony of three persons at the hearing and submitted depositions of three others and affidavits of four others to demonstrate

that compelling evidence in mitigation could have been presented to the jury that sentenced him to die, but was not offered because of the failure of his counsel to investigate his background and prepare properly for the sentencing phase of the trial. Petitioner also submitted depositions of two forensic science experts to show that opinion testimony of a state crime laboratory serologist offered by the prosecution at trial was highly suspect and could have been contested if trial counsel had consulted with and presented experts. Petitioner also presented evidence, through affidavits and depositions, of the high degree of knowledge about the case and hostility toward the petitioner in the community. His court-appointed lawyer had not offered any such evidence in support of a motion for a change of venue. The respondent offered the testimony of the lawyer who represented Mr. Cape at his trial.

HOW THE FEDERAL QUESTION WAS PRESENTED AND DECIDED BELOW

Petitioner alleged in paragraph 6 of his petition for a writ of habeas corpus that his court-appointed attorney did not render effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. In paragraph 13 of the petition, he alleged that the same constitutional guarantees were violated by counsel during the guilt-innocence stage of his trial. In other paragraphs of the petition and supplemental pleadings, petitioner set out in detail the basis for these contentions. He also presented testimony, depositions, affidavits and legal arguments in support of these contentions. The Superior Court of Butts County held that petitioner was not denied his

right to counsel under the Sixth Amendment. The court applied the standard set out in MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961), and Fitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974): " . . . not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Opinion at 5-6, App. at 5a-6a. Although acknowledging that petitioner had also based his claim on the Eighth Amendment, Op. at 2, App. at 2a, the court did not mention the Eighth Amendment in its analysis of the petitioner's claim.

In paragraphs 5-11 of his Supplemental Grounds and Amendments to Petition for a Writ of Habeas Corpus, petitioner asserted that his sentence of death was invalid because the trial court, by instructing the jury in the bare words of Ga. Code Ann. § 27.2534.1(b)( ), failed to guide the discretion of the jury as required by the Eighth and Fourteenth Amendments to the U.S. Constitution. The petitioner submitted written legal arguments in support of this contention. The Superior Court rejected this claim stating, "This Court is unaware of any requirement of specific fact-finding by a jury for (b)(7) other than to find its existence beyond a reasonable doubt." Op. at 17, App. at 17a. It also based its decision on the holdings of the Georgia Supreme Court on direct appeal. Id.

In paragraph 12 of his Supplemental Grounds and Amendments, petitioner asserted that the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7) as applied in a vague and overbroad manner to the facts of this case in violation of the Eighth and Fourteenth Amendments to the Constitution. Petitioner submitted written legal arguments in support of this contention. The Superior Court rejected this contention

on the basis of the holding of the Georgia Supreme Court on direct appeal. Op. at 18, App. at 18a.

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

I. THIS COURT SHOULD REVIEW THE DECISION BELOW TO DECIDE WHAT STANDARD OF COMPETENCY OF COUNSEL IS CONSTITUTIONALLY REQUIRED IN DEATH PENALTY CASES.

This Court should issue a writ of certiorari to decide a question of fundamental importance to the administration of criminal justice in both state and federal courts: what minimum standard of competence of defense counsel is required in capital cases in order to satisfy the Sixth and Eighth Amendments to the Constitution.

Although this Court has observed that the Sixth Amendment's right to counsel includes the right to effective assistance "within the range of competence demanded of attorneys in criminal cases[]", McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970), it left determination of this range of competence to the "good sense and discretion of trial courts." Id.

The Superior Court of Butts County, in deciding petitioner's claim of ineffective assistance of counsel, applied the standard adopted by both the Supreme Court of Georgia[3/] and the United States Court of Appeals for the Fifth Circuit:[4/] "counsel reasonably likely to render and rendering reasonably effective assistance." App. at 5a-6a. This is but one of

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3/ Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974).

4/ MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961)

several standards which is applied in state and federal courts in determining the adequacy of counsel under the Sixth Amendments. See Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am. Cr. L. Rev. 233 (1979). Some jurisdictions find counsel's ineffectiveness to violate the Sixth Amendment only if the incompetence was so gross that it rendered the proceedings a "farce and mockery of justice."[5/] The inquiry in other jurisdictions has been whether there was "gross incompetence of counsel which in effect blotted out the essence of a substantial defense,"[6/] whether counsel has exercised the "skill, judgment and diligence of a reasonably competent defense attorney,"[7/] whether the accused was represented by a "reasonably competent attorney acting as a diligent conscientious advocate,"[8/] or whether there has been "serious incompetency" that falls "measurably below the performance ordinarily expected of fallible lawyers" that "likely" affected the outcome of the trial.[9/]

5/ Erickson found in 1979 that nineteen states were applying the "farce and mockery" standard. Erickson, supra at 239 n. 53. However, in the last three years, some of those jurisdictions have rejected this standard as constitutionally insufficient. See, e.g., Lang v. Murch, 438 A.2d 914 (Me. 1981); State v. Orona, 638 P.2d 1077 (N.M. 1982).

6/ Johnson v. United States, 413 A.2d 499, 504 (D.C. App. 1980).

7/ Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980); State v. Orona, supra. See also United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976).

8/ Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978); People v. Pope, 23 Cal.3d 412, 423, 590 P.2d 859, 865, 152 Cal. Rptr. 732, 738 (1979).

9/ Commonwealth v. Seferian, 366 Mass. 89, 96, 315 N.E.2d 878, 883 (1974); United States v. DeCoster, 199 U.S. App. D.C. 359, 624 F.2d 196, 206 (1979) (opinion of Leventhal, J.), cert. denied, 444 U.S. 944 (1979).

These efforts to formulate a standard for determining whether incompetence violated the Sixth Amendment have been described as a "semantic merry-go-round."[10/] Mr. Justice White has observed that the efforts of the federal courts of appeals to formulate a standard has left them in "disarray."[11/]

This Court should grant certiorari to determine not only whether the court below applied the proper standard to determine counsel's competencey under the Sixth Amendment, but also to determine whether a more strict standard is required by the Eighth Amendment in assessing counsel's competency in death penalty cases. A brief discussion of counsel's failure to develop and present available evidence at the sentencing phase of petitioner's trial demonstrates the applicability of Eighth Amendment principles to the question of counsel's competence.

This Court has vacated death sentences where the sentencer was prohibited from considering or failed to consider any aspect of the defendant's character as a mitigating circumstance. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, ___ U.S. ___, 71 L.Ed2d 1, 102 S.Ct. 869 (1982). The failure to consider such evidence "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the

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10/ Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977) (Dunlway, J., concurring), vacated, 586 F.2d 1325 (1978) en banc).

11/ Maryland v. Marzullo, 435 U.S. 1011 (1978) (White, J., dissenting from denial of certiorari). For an example of how this issue has divided one federal court of appeals see the four opinions in United States v. DeCoster, supra (DeCoster III). See also the earlier efforts of the District of Columbia Circuit to develop a standard in Bruce v. United States, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967); Diggs v. Welch, 80 U.S. App. D.C. 5, 148 F.2d 667 (1945); United States v. DeCoster, 159 U.S. App. D.C. 326, 487 F.2d 1197 (1973) (DeCoster I).

commands of the Eighth and Fourteenth Amendments to the Constitution." Lockett v. Ohio, supra at 605 (opinion of Burger, C.J., Stewart, Powell and Stevens, JJ.).

Such an unacceptable risk occurred in petitioner's case because of the failure of trial counsel to investigate petitioner's background and present a wealth of mitigating evidence which was available. Instead, counsel presented only Mr. Cape's son, a brother and two sisters in addition to Mr. Cape himself. However, counsel failed to prepare the witness to testify and limited his questioning of them to only a few perfunctory inquiries. As a result, counsel presented the evidence in such a cursory manner that it failed to give the jury any hint of the various factors in Mr. Cape's background which were compelling reasons for not imposing a sentence of death.[12/]

Petitioner presented to the court below some of the evidence which would have been presented at the sentencing hearing if petitioner had been represented by competent counsel. At the hearing before the court below, petitioner offered the

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12/ For example, Mr. Cape's brother, Ray Cape, after identifying himself and his relationship to petitioner, was asked only:

Q. Mr. Cape, have you ever known your brother to break the law in any way?

A. No sir. No, sir.

Q. Has he always supported his family and been a good provider?

A. He has. He sure has.

Q. Is he a giving person?

A. Yes, sir. Yes, sir.

Tr. at 785. Such an examination hardly painted a picture of Mr. Cape's life in the community over a period of 56 years for the jury. The examination of the other witnesses was conducted in the same cursory manner.

testimony of Ray Cape, Gladys Woody and Mabel Mosley, all of whom testified at the sentencing hearing at trial. However, unlike the sentencing hearing, where they answered a few conclusory questions, these members of Mr. Cape's family were given the opportunity to describe Mr. Cape's upbringing, his life in the community, his role in the family and his conduct of his business affairs. In the most moving terms, these family members painted a picture of Mr. Cape as a caring man, who was called upon early in life to assume responsibilities toward his family which he always met. They described how Mr. Cape was the person that other family members looked to in times of crisis or personal distress. They described his good relations with his customers and his employers. They described the times he spent with a retarded nephew, the efforts he made to see that his brother, Ray, had light work when he was disabled and the provisions he made for family members in hard times. They testified that if given the opportunity to review family photograph albums, documents and other materials, they would be able to add more detail to the picture they painted of their brother.[13/]

Petitioner also demonstrated that other members of the community, unrelated to him, were available to come forward and describe Mr. Cape to the jury and offer evidence in mitigation. For example, Harold Mauldin was one of nine character witnesses called at the guilt-innocence stage of petitioner's trial. Tr. at 587. His entire direct examination is contained on one page of transcript. He testified that Mr. Cape's reputation was good, but when asked about his reputation for violence, answered, "I never heard of any." Tr.

13/ Petitioner submitted the affidavits of two other family members who were not called at the sentencing hearing, M.I. Cape and Haskel Cape, both brothers. Both describe instances in which Mr. Cape helped them and other members of the family.

at 587. In a deposition taken in this proceeding, Mr. Mauldin describes in twelve pages of testimony, his relationship with Garnett Cape as a schoolmate, co-worker, competitor, and neighbor. He described Mr. Cape as one of the best employees he had ever had. 14/

Leroy and Louise Lovelace, who employed the petitioner to do work on their house during the three years before his arrest, testified in depositions that Mr. Cape provided them with help beyond that expected of him in his employment, that he was trusted by them, and that he did good work for them. Mr. Lovelace, who supervised many employees in the grocery business in Miami, Florida before moving to Franklin County, was asked to describe Mr. Cape as an employee. He answered as follows:

> As the top. He is the very top. Garnett Cape is a man that you don't find but a very very few in his class. In his category.
>
> . . .
>
> . . . He is nothing but the best in my book. They don't come no better than Garnett Cape.

Deposition of Leroy Lovelace at 13. Despite the fact that petitioner had worked on a part-time basis for Mr. and Mrs. Lovelace for the three years leading up to his arrest, trial counsel

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14/ Because of the restrictions on character evidence, all nine character witnesses called at petitioner's trial were asked only a few conclusory questions about petitioner's reputation in the community. Tr. at 586-603. Some of the witnesses were confused by the nature of the questions. Tr. 589-91, 600-01. Of course none of the witnesses could describe at the guilt-innocence phase their associations with the petitioner and instances such as those recalled by Mr. Mauldin in his deposition. Yet none of the witnesses were called at the sentencing phase when they would have been able to state the basis for their conclusion that the petitioner had a good reputation in the community. Mr. Mauldin's deposition demonstates how effective such testimony would have been in putting before the jury mitigating circumstances which should have been considered in determining petitioner's sentence.

never interviewed either one. As a result, this testimony of good work, unselfishness, trust and reliability was never presented to the jury that decided whether petitioner was to live or die.[15/]

In State v. Myles, 389 So.2d 12, 27-31 (La. 1980), the Supreme Court of Louisana relied heavily on the decisions of this Court in capital cases in formulating a standard for determining whether a defendant in a capital case received constitutionally sufficient assistance:

> In determining the proper standard of competency to be applied, we are ever mindful that this is a capital case. We must not only select a standard of substance, but also give close scrutiny to insure adherence to this standard. The penalty of death is qualitatively different from a sentence of imprisonment. . . . Because of that qualitative difference, there is a corresponding need for reliability in the jury's determination that death is the appropriate punishment in a specific case. Lockett v. Ohio [supra] . . . Garoner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393, 405 (1977) (White, J., concurring); Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961 (1976). This necessary reliability is undermined unless it appears that the defendant received the competent assistance of an attorney acting as a diligent, conscientious advocate for his life. . . .

389 So.2d at 30 [emphasis added]. The court decided that specific standards set out in case law and in the American Bar Association Standards Relating to the Administration of Criminal Justice, The Defense Function (1974) were "desirable and necessary to give substance to the particular word formula chosen for the minimal level of competency." Id.

15/ Petitioner also submitted affidavits of other members of community, unrelated to him, who could have provided evidence in mitigation at the sentencing hearing. However, the failure of trial counsel to investigate petitioner's background and present this evidence deprived petitioner of his right to have the jury consider relevant and compelling evidence on the issue of whether he should live or die.

The court below acknowledged that petitioner had based his claim on the Eighth Amendment, but apparently declined to consider petitioner's claim that his Eighth Amendment rights were violated in much the same manner as in Lockett and Eddings by the failure of his counsel to investigate his background and present all of the mitigating evidence that was available. This Court should review this case to decide whether Eighth Amendment principles govern a determination of counsel's competence, and the constitutionally required standard for deciding claims of ineffective assistance of counsel.

II. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT REQUIRING THAT CONSIDERATION OF THE DEATH PENALTY BE GUIDED BY CLEAR AND OBJECTIVE STANDARDS.

Petitioner's jury was instructed at the sentencing phase of the trial in the bare words of the statutory aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7):

> Now, in this case, ladies and gentlemen, the one that we are trying, the State contends that the offense of murder for which the accused, Garnett William Cape, has been convicted was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim, Karen Dove.

Tr. 812. The jury was given no definition of any of the terms of § (b)(7). The trial court also failed to give the jury any guidance regarding its consideration of mitigating circumstances in determining whether the penalty of death was appropriate. Although the words of section (b)(7) were written down and provided to the jury for study during its

deliberations, its only instruction with regard to mitigating circumstances was the statement that it was authorized to consider "those circumstances which in fairness and mercy shall be considered by you in fixing punishment," Tr. 813. The evidence presented clearly justified consideration by the jury of a number of mitigating factors, such as petitioner's age, 56, his lack of prior arrests or convictions, and his good reputation in the community. However, the jury was given no meaningful guidance as to whether it was allowed to consider these factors or how it should consider them.

The jury in returning its sentence of death made no specific findings of fact, but merely parroted the language of the statute which had been quoted to them by the trial court. Thus, as in Godfrey v. Georgia, 446 U.S. 420 (1980), the trial judge's sentencing instructions "gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation." Id. at 429 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). Therefore, petitioner is entitled to a new sentencing hearing at which the sentencer's discretion is properly directed and channeled as required by Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976), and Godfrey.

> The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards. . . . To give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to any murder . . . -- would effectively grant it unbridled discretion to impose the death penalty.

Godfrey, supra at 437 (Marshall, J., concurring) [citations omitted]. Under Ga. Code Ann. §26-3102, 27-2534.1(c), the sentencing authority in death cases is the jury. Once the penalty has been imposed in the exercise of unbridled discretion by the jury, it cannot be salvaged by appellate review. Here, as in Godfrey, "the standardless and unchanneled imposition of the death sentences in the uncontrolled discretion of a basically uninstructed jury . . . was in no way cured by the affirmance of those sentences by the Georgia Supreme Court." 446 U.S. at 429 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). As Mr. Justice Marshall stated:

> Such a defect could not be cured by the post hoc narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

446 U.S. at 437 (Marshall, J., concurring).

The Georgia Supreme Court upheld petitioner's sentence of death on direct appeal from petitioner's conviction based upon its finding of serious physical abuse and serious sexual abuse. There is nothing in the record to suggest that the jury made the same findings. As petitioner stated in his habeas corpus petition, the jury could well have based the death penalty upon its belief that an aggravated battery took place since that term was not defined for it in the court's instructions. Or it could have based its decision on the testimony of Agent Patterson that this was one of the most brutal murders he had seen in 23 years as a police officer. The Georgia Supreme Court's speculation as to what the jury found based upon its review of a cold record is inconsistent

with Godfrey, Gregg and Furman. See also Presnell v. Georgia, 439 U.S. 14 (1979); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91-92 (1965). Because of the importance of this issue in the review of death penalty cases, this Court should grant certiorari to review the decision below.

III. THE GEORGIA COURTS CONTINUE TO CONSTRUE ITS DEATH PENALTY STATUTE IN A VAGUE AND OVERBROAD MANNER IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This court should issue a writ of certiorari to review the decision below because of the clear failure of the Georgia courts to narrow properly the application of the "catchall" aggravating circumstance contained in Ga. Code Ann. 27-2534.1 (b)(7), despite the decisions of this Court in Gregg v. Georgia, supra, and Godfrey v. Georgia, supra.[16/] This case presents an excellent example of the overbroad application of the terms of § (b)(7) by the Georgia courts. Because the Georgia courts construe § (b)(7) in such a way as to apply those terms to any assault of lethal magnitude, any and all murder cases can come within the death penalty statute. As a result, the decision of impose death rests in the unfettered discretion of Georgia prosecutors and juries in violation of the Eighth and Fourteenth Amendments.

Petitioner's sentence of death rests soley upon a finding under (b)(7) that the offense of murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." The Georgia Supreme

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16/ In Gregg v. Georgia, 428 U.S. 153 (1976), this Court held that the statutory aggravating circumstance contained in § (b)(7) was not unconstitutional on its face, but warned that it should not be given "an open-ended construction." Id. at 201 (opinion of Stewart, Powell and Stevens, JJ.). In Godfrey v. Georgia, 446 U.S. 420 (1980), the Court reversed a decision of the Georgia Supreme Court where it had failed to apply in that case a narrow construction of § (b)(7) necessary to avoid the arbitrary and capricious infliction of the death sentence.

Court upheld petitioner's death sentence on the basis of its finding of serious physical abuse and serious sexual abuse, which, in its view, constitute "torture." The court's conclusion that the victim was physically abused is based upon the condition of the body after the decedent had been beaten with an iron pipe and stabbed. Cape v. State, supra 272 S.E.2d at 495. The finding of sexual abuse was based upon the fact that the decedent's breast was exposed and her pants were unzipped when the body was discovered and the testimony of a serologist that there was a "weak suggestion" of seminal fluid on an oral swab. Id. However, there was no evidence that the decedent was subjected to prolonged physical abuse such as would constitute torture prior to her death. Indeed, the decedent may have been rendered unconscious by the first blow she received. Tr. 332. Thus, as Mr. Justice Marshall pointed out in his concurrence in Godfrey:

> The Georgia court has given an extraordinarily broad meaning to the word "torture." Under that court's view, "torture" may be present whenever the victim suffered pain or anticipated the prospect of death. . . That interpretation would of course enable a jury to find a Section (b)(7) aggravating circumstance in most murder cases.

Godfrey v. Georgia, supra at 441 n. 12 (Marshall, J., concurring). The Georgia courts, in petitioner's case and other cases decided after Godfrey, have continued to aply such an extraordinarily broad meaning to the word "torture" in upholding death sentences under section (b)(7). See e.g., Mulligan v. State, 245 Ga. 881, 268 S.E.2d 351 (1980), cert. denied, 449 U.S. 986 (1980) (where decedent shot four times and first shot was not fatal, jury was authorized to find serious physical abuse constituting torture prior to death);

Brooks v. State, 246 Ga. 262, ___, 271 S.E.2d 172, 173 (1980); cert. denied, ___ U.S. ___, 68 L.Ed.2d 312 (1981) (where decedent shot once in neck and died within two hours, jury authorized to find torture because death not instantaneous); Baker v. State, ___ Ga. ___, 272 S.E.2d 61, 62 (1980), cert. denied, ___ U.S. ___, 67 L.Ed.2d 371 (1981) (where victim struck with a whiskey bottle and shot three times in the chest, jury authorized to find torture).[17/]

The Georgia Supreme Court's treatment of the (b)(7) issue here provides "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, supra at 433 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). Because the construction of (b)(7) by the Georgia courts raises an important constitutional issue which should be settled by this Court, a writ of certiorari should issue to review the decision below.

17/ Thus, the Georgia Supreme Court has failed to limit (b)(7) to cases such as McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974) and House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), as anticipated by the prevailing opinions in Gregg v. Godfrey. Gregg, supra at 201 (opinion of Stewart, Powell and Stevens, JJ.); Godfrey, supra, at 429-30 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). (In McCorquodale, the victim suffered prolonged torture in which she was beaten, burned, bitten, cut with a razor and scissors, sodomized, raped, and subjected to salt being placed in her wounds and hot wax dripped over her body before she was strangled and killed. In House, two seven year old boys were choked to death after each had been forced to submit to anal sodomy.) The Georgia court's cursory treatment of (b)(7) in petitioner's cases and other cases indicates that it has not properly limited (b)(7) to a few cases like McCorquodale and House.

CONCLUSION

For the reasons stated herein, Garnett William Cape asks that a writ of certiorari issue to review the decision of the court below.

Respectfully submitted,

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